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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

ASHER B. HILL,
Petitioner,

v.

BILL WILSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Asher Hill exercised his Sixth Amendment right to represent himself in criminal proceedings in Marion County, Indiana. After discharging his counsel, Mr. Hill made the tactical decision to proceed to trial as quickly as possible. At the final pretrial hearing, however, the State demanded a continuance to allow an ill witness to attend the trial. Mr. Hill countered the State's request by exercising his right under Indiana law to stipulate to the missing witness's testimony—a stipulation which, under Indiana law, prohibited the court from delaying the trial. Despite the statute, however, the court refused to accept Mr. Hill's stipulation, granted the continuance, continued to hold Mr. Hill in jail during the delay, and finally proceeded with a trial that included the witness.

This Court has held that the Sixth Amendment right to represent oneself includes the right to make significant tactical decisions affecting the defense. Yet the Seventh Circuit in this case held that the right of self-representation merely means that "[a] court cannot interpose an unwanted lawyer between the defendant and the tribunal or refuse to accept from the defendant motions that it would entertain if made by counsel." Moreover, the Seventh Circuit announced a blanket rule that "errors of state law do not justify collateral relief under [28 U.S.C.] § 2254." The Seventh Circuit's decision in this case therefore presents the following important questions:

I. Whether the "significant tactical decisions" reserved to a *pro se* defendant are limited to being

free of an unwanted lawyer, and having the court consider motions it would accept from counsel, or do the tactical decisions reserved to defendants extend more broadly to other decisions that involve litigation tactics—such as the decision to proceed immediately to trial, and to stipulate to a witness's testimony?

II. Whether a state court's denial of a *pro se* defendant's tactical decision to exercise a right created under state law can also violate the defendant's Sixth Amendment right to represent himself, such that habeas review under 28 U.S.C. § 2254 is permitted?

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Petitioner Asher Hill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinions of the Indiana Court of Appeals denying relief on direct appeal are reported at 773 N.E.2d 336 (Ind. Ct. App. 2002), *transfer denied,* 792 N.E.2d 35 (Ind. 2003) (App. 32a-56a), and 777 N.E.2d 795 (Ind. Ct. App. 2002).[1] The district court's opinion denying Mr. Hill's petition for a writ of habeas corpus is unpublished. *Hill v. McBride*, No. 04-506, slip op. (N.D. Ind. Mar. 30, 2006) (App. 8a-31a). The Seventh Circuit's opinion affirming the district court's denial of habeas relief, *Hill v. Wilson*, is reported at 519 F.3d 366 (7th Cir. 2008) (App. 1a-7a). The Seventh Circuit's order denying Mr. Hill's petition for rehearing *en banc* is unpublished (App. 57a-58a).

STATEMENT OF JURISDICTION

The Seventh Circuit issued its opinion on March 10, 2008. The petitioner timely filed a petition for rehearing *en banc* on March 24, 2008, which petition was denied on April 4, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

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[1] Mr. Hill cites to the appendix as "App." and to portions of the trial transcript as "T.Tr."

PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Constitution's Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The habeas statute, 28 U.S.C. § 2254(d), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Indiana Code § 35-36-7-2 states:

(a) A prosecuting attorney may move to postpone the trial of a criminal cause because of the absence of a witness whose name is endorsed on the indictment or information, if he makes an official statement:

(1) containing the requirements of subsections (b)(1) and (b)(2) of section 1 of this chapter;

(2) showing that the absence of the witness has not been procured by the act of the prosecuting attorney;

(3) stating the facts to which he believes the witness will testify, and include a statement that he believes these facts to be true; and

(4) stating that the prosecuting attorney is unable to prove the facts specified in accordance with subdivision (3) through the use of any other witness whose testimony can be as readily procured.

Upon request of the defendant the court shall order that the prosecuting attorney's motion and official statement be made in writing.

(b) The trial may not be postponed if:

(1) after a motion by the prosecuting attorney because of the absence of a witness, the defendant admits that the absent witness would testify to the facts as alleged by the prosecuting attorney in his official statement in accordance with subsection (a)(3). . . .

STATEMENT OF THE CASE

A. Introduction.

Mr. Hill was charged with several crimes in Marion County, Indiana and the trial court appointed counsel to represent him. Dissatisfied with appointed counsel's representation, including counsel's acquiescence to multiple continuances of his trial date, Mr. Hill moved to represent himself. After the court granted this motion on February 28, 2001, Mr. Hill said that he was ready for trial and asked for the earliest possible trial date. The court set Mr. Hill's trial for March 19, 2001, and scheduled a final pre-trial hearing for March 16, 2001. (T.Tr. 672.)

B. The March 16th hearing.

During the March 16 hearing, the state moved for an emergency continuance under Ind. Code § 35-36-7-2 because the victim, who was to testify, had

suffered a heart attack and was unable to appear on March 19, the date of trial.

The State, consistent with the requirements of Section 35-36-7-2 of the Indiana Code, proffered 33 statements summarizing the missing witness's expected testimony. In response to the state's motion, Mr. Hill offered to stipulate to the 33 proffered statements. (T.Tr. 690, 699.) In so doing, he sought to exercise his rights under Section 35-36-7-2(b)(1) of the Indiana Code, which states that the court may not postpone a trial because of an absent witness if the defendant admits that the absent witness would testify as alleged by the prosecution.

Notwithstanding Mr. Hill's multiple objections to further delaying the trial, and his observation that proceeding immediately to trial could "be to [his] advantage," the trial court postponed the trial. The court cited Mr. Hill's *pro se* status, and the court's preference that Mr. Hill have the ability to cross-examine the missing witness. (T.Tr. 725-26.)

The trial court thus overruled Mr. Hill's seven separate objections (during the March 16 hearing alone) to postponing the trial. For instance, when the state first moved to continue, Mr. Hill responded that "[the state] knows I want to go to trial. I've been in jail ten months and I got family issues . . . ." (T.Tr. 695.) When the judge explained that the delay would be less than 90 days, Mr. Hill again objected, saying "[t]hat's not fair. And I feel that my freedom is seriously being tampered with . . . ." (T.Tr. 699.) Nevertheless, despite Mr. Hill exclaiming that he did not "want no continuance," the state demanded the

delay so that the *witness* could have "*his* day in court." (T.Tr. 704 (emphasis added).)

Mr. Hill did not balk in his demand to proceed directly to trial despite a judicial rebuke that his decision was allegedly unwise: when the court said "Mr. Hill, if you had a lawyer who made that kind of decision I would find the lawyer incompetent," Mr. Hill responded, "Okay. But I'm making this decision. I want to go. . . . I'm tired of being in jail for a crime I didn't commit, point blank." (T.Tr. 703.)

Finally, after a half-hour recess, the court again asked Mr. Hill, "[a]nd you want to go to trial even though your accuser won't be here and you won't be able to confront him, is that what I understand?" Mr. Hill responded, "Yeah, that's what I'm saying." (T.Tr. 725.)

Despite Mr. Hill's offer to stipulate—which Section 35-36-7-2 required the court to accept—the court granted the state's motion to postpone the trial. In so doing, the court said:

> The process for your exoneration . . . is an involved process. You've chosen to try to walk through that maze by yourself without the assistance of a lawyer . . . and that's your right. But I'll tell you, I would not feel right putting you in jail for the rest of your life with this case in the posture it's in now. So over your objection I'm going to grant the State's emergency continuance.

(T.Tr. 725-26.) After the trial court ruled, Mr. Hill objected yet again, stating:

> You know, I understand that . . . you wouldn't feel right . . . without me having the opportunity to cross-examine the witness and I appreciate your concern . . . but, you know, you got to take into consideration that I've been in jail for ten months. I got a family. People—I mean, you people, it seem like I have no life of my own.

(T.Tr. 727.)

C. Trial and direct appeal in the state courts.

Mr. Hill finally went to trial on May 14, 2001, and with the state's witness testifying, he was convicted of one count of robbery, criminal confinement, and carrying a handgun without a license. Mr. Hill was acquitted of attempted murder and a second count of armed robbery. (App. 36a-37a.) On direct appeal, Mr. Hill argued, *inter alia*, that the trial court's refusal to accept his stipulation and proceed directly to trial stripped him of his right to make significant tactical decisions affecting his defense, and thus violated his right to represent himself. (App. 44a-45a.)

The Indiana Court of Appeals agreed that "the trial court erred when it granted the State's request for a continuance." (App. 48a.) Nevertheless, the court denied relief as Mr. Hill allegedly "preserved actual control over the case that he presented to the jury." (App. 50a.) Furthermore, the appellate court decided that Mr. Hill's tactical decision to stipulate allegedly was not "central to the defense that [he] was mounting." (App. 49a.) The Supreme Court of Indiana denied Mr. Hill's petition to transfer. *Hill v.*

State, 792 N.E.2d 35 (Ind. 2003) (unpublished table decision).

D. Post-conviction proceedings.

Mr. Hill filed a petition for post-conviction relief in Indiana state court on February 20, 2003, in which he argued ineffective assistance of appellate counsel. That petition was denied. The Indiana Court of Appeals affirmed the post-conviction court's decision in an order dated August 30, 2004, *Hill v. State*, 814 N.E.2d 726 (Ind. Ct. App. 2004) (unpublished table decision), and the Indiana Supreme Court denied transfer on November 4, 2004. *Hill v. State*, 822 N.E.2d 980 (Ind. 2004) (unpublished table decision).

E. Mr. Hill's § 2254 petition.

On December 7, 2004, after exhausting his state court remedies, Mr. Hill timely filed a *pro se* petition for relief under 28 U.S.C. § 2254 in the United States District Court for the Northern District of Indiana. Mr. Hill argued, among other things, that the trial court's refusal to accept his stipulation violated his right to self-representation. The district court, which had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2241, denied Mr. Hill's petition on March 30, 2006, holding that the Indiana appellate court's ruling on Mr. Hill's self-representation claim was not an unreasonable application of clearly established federal law. (App. 29a-31a.)

Mr. Hill sought a certificate of appealability from the district court on April 24, 2006 and timely filed

his notice of appeal on April 28, 2006. The district court granted a certificate of appealability on the question of whether the trial court violated Mr. Hill's Constitutional right of self-representation when it refused to accept his stipulation to an absent witness's testimony.

On July 3, 2007, the Seventh Circuit appointed the undersigned counsel to represent Mr. Hill. The Seventh Circuit affirmed the district court on March 10, 2008, holding that the right of self-representation merely prohibits a court from (i) interposing an unwanted lawyer between the defendant and the tribunal, or (ii) refusing to accept from the defendant motions that it would entertain if made by counsel. The Seventh Circuit also ruled that "errors of state law do not justify collateral relief under § 2254." (App. 4a-5a.) Mr. Hill timely filed a petition for rehearing *en banc* on March 24, 2008, which was denied on April 4, 2008.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's opinion conflicts with decisions of this Court and other circuits, which hold that a *pro se* defendant has the right to make significant tactical decisions about his case. Moreover, the Seventh Circuit's opinion conflicts with decisions from other circuits which hold that a state court's violation of state law may also violate a defendant's federal constitutional rights. Accordingly, this Court should issue a writ of certiorari to resolve a conflict between the circuits and to settle an important question of federal law concerning the scope of the right of self-representation.

I. The denial of Mr. Hill's self-representation claim conflicts with decisions of this Court and other courts of appeals.

Under the Sixth Amendment, a *pro se* defendant is entitled to make significant tactical decisions concerning his defense. *McKaskle v. Wiggins*, 465 U.S. 168, 175-78 (1984). As the Court held, whenever a third party "make[s] or substantially interfere[s] with any significant tactical decisions," the right of self-representation "is eroded." *Id.* at 178. The right to represent oneself exists to protect the autonomy of the accused and to allow the presentation of what may be the best possible defense. *Id.* at 176-77. And, although the accused may ultimately conduct his defense to his detriment, his choices must be honored "out of 'that respect for the individual, which is the lifeblood of the law.'" *Faretta v. California*, 422 U.S. 806, 834 (1975) (citation omitted). To hold otherwise would turn "'[w]hat were contrived as protections for the accused . . . into fetters'" that "'imprison [him] in his privileges.'" *Id.* at 815 (citation omitted).

This Court's landmark decision in *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942) recognizes the central principle at stake in this case, which the Seventh Circuit ignored: under the Sixth Amendment, a *pro se* defendant's decisions must be respected. In that case, the Court considered whether a *pro se* defendant could waive his right to a trial by jury. The circuit court said no, holding that only a lawyer could waive a Constitutional right. Reversing, this Court held that it is an anathema to "deny an accused a choice of procedure in

circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice." *Adams*, 317 U.S. at 280. In so holding, the Court explained that there can be tactical advantages to waiving a Constitutional right, and that a *pro se* defendant is fully capable of weighing those advantages and making a decision. *Id.* at 277-78. Mr. Hill chose to do exactly that—waive his right under the Sixth Amendment to cross-examine the absent witness, who was his chief accuser—in order to exercise his right under state law to proceed immediately to trial.[2]

Other circuits considering the right of self-representation have recognized that tactical decisions—no matter how risky—are the province of the *pro se* defendant. For example, the Fifth Circuit held that a district court's appointment of independent counsel to present mitigating evidence during the penalty phase of a capital case violated the defendant's right of self-representation, because the defendant made it "quite clear that he [did] not want any traditional mitigating evidence to be presented on his behalf" but rather intended to

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[2] In analyzing the similar problem of when a court should recharacterize a motion from a *pro se* defendant, Justices Scalia and Thomas recognized the dangers of trial court interference with a *pro se* defendant's motion practice. *Castro v. United States*, 540 U.S. 375, 386-87 (2003) (Scalia, J., concurring) ("For the overriding rule of judicial intervention must be 'First, do *no harm*.' The injustice caused by letting the litigant's own mistake lie is regrettable, but incomparably less than the injustice of *producing* prejudice through the court's intervention." (emphasis in original)).

employ the "admittedly risky strategy" of attacking the strength of the government's case. *United States v. Davis*, 285 F.3d 378, 384-85 (5th Cir. 2002). And although the district court may have intended to act with the defendant's best interests at heart, the Fifth Circuit explained that the appointment of independent counsel was inconsistent with the defendant's right to direct his trial strategy. *Id.* ("*Faretta* teaches us that the right to self-representation is a personal right. It cannot be impinged upon merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented . . . ."). *See also United States v. Curcio*, 694 F.2d 14, 25 (2d Cir. 1982) ([T]he defendants' choice . . . may sometimes seem woefully foolish to the judge. But the clear thrust of *Faretta* is that the choice is mainly theirs; the judge, much less the prosecutor, is *not* to assume too paternalistic an attitude in protecting the defendant from himself." (emphasis in original)).

Mr. Hill believed so firmly that he would benefit by stipulating and proceeding immediately to trial that he was even willing to forego his Sixth Amendment right to cross-examine the missing witness. In conducting this analysis, Mr. Hill realized that there could be a tactical advantage if a key prosecution witness testified through a stipulation rather than live; he weighed the benefits of stipulating against the costs of foregoing the opportunity to cross-examine the witness; and he made his tactical decision to take advantage of the procedural option available to him under Section 35-

36-7-2. Under the principles set forth by this Court in *Adams*, Mr. Hill was capable of making an intelligent decision. The courts below should have respected it.

The trial court, however, did no such thing. Rather, the judge overruled Mr. Hill's tactical decision and replaced it with his own preference: that Mr. Hill cross-examine his accuser. This choice evidently salved the trial judge's personal discomfort with the possibility that Mr. Hill could be sentenced to life imprisonment without cross-examining the witness:

> But I'll tell you, I would not feel right putting you in jail for the rest of your life with this case in the posture it's in now.

(T.Tr. 725.)

Notwithstanding the trial judge's preference, the decision whether to waive the right to cross-examine in order to get an immediate trial, or to exercise the right to cross-examine after waiting for trial, was a decision that under the Sixth Amendment belonged to *Mr. Hill*. The judge's personal feelings were not a basis to overrule Mr. Hill's decision, even if the judge thought it would help him. *E.g.*, *Curcio*, 694 F.2d at 25 (*pro se* defendant's decision, even if "woefully foolish," is not for court to overrule, and courts should not become overly paternalistic in "protecting the defendant from himself").

Moreover, there is no doubt that Mr. Hill's decision to exercise his right to stipulate was tactical and significant in that it (should have) permitted

him to sidestep the impact of having his chief accuser testify in person before the jury. Various courts have recognized that stipulating to live witness testimony can be good trial strategy. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 203 (1995) ("[E]videntiary stipulations are a valuable and integral part of everyday trial practice. Prior to trial, parties often agree in writing to the admission of otherwise objectionable evidence, either in exchange for stipulations from opposing counsel or for other strategic purposes."); *United States v. Kennedy*, 797 F.2d 540, 543 (7th Cir. 1986) (stipulation was good trial strategy where it saved defendant from almost certain harm that would have occurred from live witness testimony). *See also Old Chief v. United States*, 519 U.S. 172, 186-87 (1997) (explaining how live witness testimony may carry significantly more weight than "a naked admission").[3]

The Seventh Circuit's opinion in this case is inconsistent with this Court's teachings and with the

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[3] Although *Old Chief* answers the question of whether the absence of a witness through no fault of the state is a valid reason for delay within the Sixth Amendment's speedy trial clause (an issue raised below but not at issue in this petition for certiorari), the answer to that question does not, as the Seventh Circuit suggests, answer whether Mr. Hill was entitled to exercise his right to make the tactical decision to stipulate to live witness testimony, as permitted under state law. In *Old Chief*, the defendant did not have a statutory right to stipulate to a missing witness's testimony, thereby avoiding any delay of his trial. Here Mr. Hill had such a right and attempted to exercise it as authorized by the Sixth Amendment right of self-representation.

decisions of other circuits. According to the Seventh Circuit, the self-representation right merely prevents a court from "interpos[ing] an unwanted lawyer between the defendant and the tribunal or refus[ing] to accept from the defendant motions that it would entertain if made by counsel." (App. 4a.) The ruling below thus fails to acknowledge that the right to represent oneself includes—as this Court observed in *McKaskle*—the ability to make significant tactical decisions affecting the defense. As *McKaskle* held, interference by standby counsel with a *pro se* defendant's "significant tactical decisions" erodes the Sixth Amendment right of self-representation. *McKaskle*, 465 U.S. at 178. If standby counsel cannot interfere with such decisions, then, *a fortiori*, neither can the trial judge.

The Seventh Circuit's opinion leaves standing the Indiana Court of Appeals' erroneous interpretation of the right of self-representation, which is fundamentally at odds with the governing Supreme Court law: in denying Mr. Hill's Sixth Amendment claim, the Indiana Court of Appeals held that "while Hill's decision to proceed to trial without [the missing witness] could be considered a tactical decision, it was not a tactical decision that was *central to the defense* that Hill was mounting." (App. 49a (emphasis added).) But, as explained *supra*, *McKaskle* holds that the right of self-representation is the right to make significant tactical decisions. *McKaskle*, 465 U.S. at 178. A tactical decision can be significant without necessarily being "central to the defense," as the Indiana appellate court requires. As such, the Indiana appellate court's central-to-the-

defense formulation heightens the standard for Sixth Amendment self-representation claims. The Seventh Circuit failed to address this issue, which should be reviewed in this Court.

Moreover, this Court's jurisprudence does not limit a defendant's Sixth Amendment right to represent himself, as the Seventh Circuit suggests, to barring a court from interposing an unwanted lawyer between the defendant and the tribunal, or refusing to accept motions it would accept from counsel. (App. 4a.) Indeed, the First Circuit explicitly rejected such a narrow reading of the right to self-representation, holding that "[i]t is not enough to establish actual control by showing that, in the words of the respondent, '[the defendant] filed motions, questioned witnesses and argued his cause.'" *Oses v. Massachusetts*, 775 F. Supp. 443, 458 (D. Mass. 1991), *aff'd*, 961 F.2d 985 (1st Cir. 1992). Rather, that court explained the importance of reading *McKaskle* as a whole, which includes heeding *McKaskle's* injunction that all significant tactical decisions are the province of the *pro se* defendant. *See Oses*, 775 F. Supp. at 456 (citing *McKaskle*, 465 U.S. at 178).

The Seventh Circuit further explained its decision by asserting that the trial court would have granted an extension regardless of whether Mr. Hill or a lawyer appointed to represent him had opposed it: the trial judge allegedly "said enough to show that he would have postponed the trial whether or not Hill was representing himself." (App. 4a.) Although the trial court did state, "Mr. Hill, if you had a lawyer who made that kind of decision I would find

the lawyer incompetent" (T.Tr. 703), this comment occurred in the middle of a long exchange in which the court was attempting to determine whether Mr. Hill truly wanted to exercise his rights under Ind. Code § 35-36-7-2 and waive his right to confront his accuser under the Sixth Amendment. The point of the statement was to test Mr. Hill's commitment to his position, not (as the Seventh Circuit suggests) to issue a hypothetical ruling about whether, under different circumstances, the court would still grant the motion. This Court should not credit the Seventh Circuit's speculation—which takes one comment by the trial judge out of its larger context and ignores the remaining colloquy between Mr. Hill and the court—as to whether the trial court would have permitted an attorney to stipulate to the absent witness's testimony. The fact is, under Indiana law, the trial court had *no choice* but to allow the stipulation, whether it came from Mr. Hill or someone representing him. Ind. Code § 35-36-7-2. (App. 48a.)

The Seventh Circuit also reasoned that "Hill can prevail only if the Sixth Amendment creates a rule that motions made pro se must be granted (or, perhaps, that no state court may err in ruling on a proposal made by a defendant who represents himself)." (App. 4a.) But Mr. Hill makes no such argument. The question in this case is not, as the Seventh Circuit suggests, whether the trial court must grant all motions of a *pro se* defendant. Rather, the issue is whether the trial court's decision to overrule Mr. Hill's decision to exercise his right to stipulate and thereby proceed immediately to trial

unconstitutionally stripped him of his Sixth Amendment right to control his own defense while representing himself. Where the Indiana Code provided Mr. Hill with the right to stipulate to a missing witness's testimony, and the Sixth Amendment guaranteed him the right to make tactical decisions about his defense, the trial court was not free to continue the case because it "would not feel right putting [Mr. Hill] in jail . . . with the case in the posture it [was] in." (T.Tr. 725.) This is the very definition of interference with a tactical decision. And, as recognized by this Court in *Adams*, and by the *Davis* and *Curcio* courts, such interference is improper.

Similarly, the Seventh Circuit's suggestion that the election of a tactical option available under state law would cause the meaning of the Constitution to "change from state to state, and year to year, according to the majority vote of a local legislature," is misplaced. (App. 7a.) Nothing about a tactical choice to utilize a procedure available under state law alters the central premise of the Sixth Amendment right of self-representation—*i.e.*, that a defendant has the right to make significant tactical decisions concerning his defense. Although the tactical options available to a *pro se* defendant may vary according to local procedure, the right to make a tactical choice from among the available options (whatever they may be) is a Constitutional principle that applies throughout the nation.

Under these circumstances, the trial court's decision to overrule Mr. Hill's considered tactical choice violated the Sixth Amendment. When it

affirmed the denial of Mr. Hill's habeas petition, the Seventh Circuit not only erred, but announced a brand-new rule of law that misconstrues this Court's decisions and conflicts with the decisions of other circuits.

II. The Seventh Circuit's categorical rule that "errors of state law do not justify collateral relief under § 2254" misconstrues the federal Constitutional issue in this case, and is inconsistent with this Court's decisions and the opinions of other circuits.

In addition to unduly limiting the substantive contours of the right of self-representation, the Seventh Circuit announced a second basis for denying Mr. Hill's Sixth Amendment claim: namely, that the state court "simply made an error of state law when deferring the trial. And errors of state law do not justify collateral relief under § 2254." (App. 5a.) There is no doubt that the trial court committed an error of state law, as the Indiana appellate court held: "the trial court erred when it granted the State's request for a continuance." (App. 48a.) The state appellate court explained that "when Hill agreed that the State could present [the missing witness's] stipulated testimony pursuant to Ind. Code § 35-36-7-2(b)(1), the trial court did not have discretion to postpone the trial." (App. 48a.) But that is not the end of the matter.

As discussed *supra*, the Indiana Court of Appeals committed a Constitutional error by misapplying—indeed, rewriting—the standard for reviewing self-

representation claims under the Sixth Amendment ("central to the defense," as opposed to "significant" tactical decisions). Such errors are ripe for habeas relief. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (state court's decision is contrary to federal law, and eligible for habeas relief, when state court rewrites standard of review). The Seventh Circuit's categorical rule that "errors of state law do not justify" habeas relief ignores the Constitutional dimension of the problem Mr. Hill raises—that the trial judge's refusal to accept Mr. Hill's stipulation deprived him of a tactical option at his disposal, and overruled his considered decision regarding how best to conduct his defense in light of the available procedural options. This is a purely federal issue that squarely implicates the Sixth Amendment. The fact that an error of state law also occurred is not a basis for the Seventh Circuit to dismiss Mr. Hill's claims as *only* concerning state law.

The finding of a state-law violation does not terminate any Constitutional inquiry. Indeed, as other circuits have recognized, the fact that a state-court action violated state law says nothing about whether the same action also may have violated the United States Constitution. Thus, for example, in *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999), the court considered a habeas petitioner's challenge to a state court's failure to give a specific jury instruction that the petitioner was entitled to use deadly force to stop a sexual assault. The state appellate court held that the failure to so instruct was harmless as no rational jury could have found deadly force to be justified under the circumstances. The Sixth Circuit,

however, issued the writ, holding that the trial court's failure to instruct the jury violated the petitioner's Sixth Amendment right to have a jury evaluate the evidence and reach the requisite finding of guilt. *Id.* at 874.

Similarly, in *Jackson v. Edwards,* 404 F.3d 612 (2d Cir. 2005), the court considered a habeas petitioner's challenge under Section 2254 to a state court's failure to give a requested instruction that a homicide committed by the defendant was justified, where the petitioner claimed that the instruction was required under state law. The Second Circuit affirmed the district court's award of habeas relief, in part because the petitioner had "'a clear right under [state] law to have the jury consider his defense [of justification].'" *Id.* at 627 (citation omitted). The court then explained that the failure to consider the state-law defense violated the petitioner's *federal* constitutional rights. *See also Davis v. Strack*, 270 F.3d 111, 132 (2d Cir. 2001) (affirming grant of habeas relief on due process grounds where state court refused to give jury instruction required under state law).

Gilmore v. Taylor, 508 U.S. 333, 342 (1993), and *Estelle v. McGuire*, 502 U.S. 62 (1991), cited by the Seventh Circuit, are not to the contrary. Those cases considered whether substantive errors of state law violated defendants' due process rights. *Cf. Gilmore*, 508 U.S. at 344 ("instructional errors of state law generally may not form the basis for federal habeas relief"); *Estelle*, 502 U.S. at 70 (same). But the issue here, as is *Yukins*, is not whether the Indiana courts made an error of state law. The Indiana Court of

Appeals has already answered that question. (App. 48a.) Rather, the question here concerns whether the denial of Mr. Hill's right to present a defense in the manner authorized by state law violated his *federal* right of self-representation—an issue not addressed in *Gilmore* or *Estelle*.

This Court has also recognized that state-law rights are not necessarily coextensive with federal rights. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (collecting cases and explaining that deficient jury instructions that are proper under state law may nevertheless violate a defendant's federal due process rights under the Constitution). As such, it was improper—and inconsistent with the rulings of this Court and other courts of appeals—for the Seventh Circuit to conclude that the Indiana appellate court's finding of a state-law error necessarily precludes the existence of a simultaneous federal Constitutional problem.

The weight of authority makes clear that a state court's denial of a right provided by state law can also deprive a defendant of his federal rights. Just so here: when the Indiana trial court prevented Mr. Hill from exercising his right to stipulate to the witness's testimony, it not only violated Indiana law but also interfered with Mr. Hill's right under the Sixth Amendment to make and control the significant tactical decisions in his case. Mr. Hill is entitled to habeas relief not because the state court violated a state law, but because the state court overruled Mr. Hill's tactical decision and stripped away his control—reserved to Mr. Hill under the Sixth Amendment—over his own defense.

CONCLUSION

Petitioner Asher B. Hill respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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